Supreme Court, U.S.
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In The

Supreme Court of the United States

RONNIE GARNER,

Petitioner,

v.

KELLY GARNER,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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October 29, 2003

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Fourteenth Amendment and the Fifth Amendment of the Constitution of the United States, does Congress' criminalization of delinquent child support increase the burden of proof on States to protect litigants' due process rights in the establishment of child support?

2. Under the Fourteenth and Fifth Amendments of the Constitution, are New Mexico's child support statutes so impermissibly vague as to deny due process to an entire class of litigants?

3. Under the Spending Powers Clause, Article I, Section 8, Clause 1, of the Constitution of the United States, do New Mexico's child support statutes violate Federal law and is federal preemption mandated?

4. Does New Mexico violate the Fourteenth and the Fifth Amendments of the Constitution of the United States by denying a hearing to a class of litigants.

LIST OF AFFILIATED CORPORATIONS

There are no corporations or affiliated corporations involved with this case. All parties to the proceeding are listed in the caption.

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CITATION TO OPINIONS BELOW

Ronnie Garner prays that the Supreme Court grant a writ of certiorari to review the judgment of the court below.

The unpublished opinion of the New Mexico Court of Appeals is *Kelly Garner v. Ronnie Garner*, Memorandum Opinion No. 23,761 (N.M. App. 2003); Petition for Writ of Certiorari, No. 3/28127, was denied by the Supreme Court of New Mexico on August 4, 2003.

JURISDICTION

The Opinion of the New Mexico Court of Appeals was entered on June 6, 2003. **App. 1** Petitioner filed a timely Petition for Writ of Certiorari with the New Mexico Supreme Court on June 26, 2003. The New Mexico Supreme Court entered its order denying certiorari on August 4, 2003. **App. 14**

28 U.S.C. § 2403(b) may apply and a copy of this Petition shall be served on the Attorney General of the State of New Mexico.

This Court has jurisdiction to issue a writ of certiorari to the New Mexico Court of Appeals pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment V.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

The Congress shall have Power to Lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and Provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;

United States Constitution, Article 1, Section 8, Clause 1.

Child Support Enforcement Program, Title 42, Chapter 7, Subchapter IV Part D, 42 U.S.C. §§ 651-669. **App. 15**

Code of Federal Regulations, Title 45, Chapter III, Child Support Enforcement Program, Sections 300-399. **App. 17**

STATEMENT OF THE CASE

Petitioner filed his motion for change of custody and visitation November 12, 1998 to alter the existing 50/50 time-sharing and joint custody. A trial on the merits occurred on May 10-11, 2000 and the presiding judge, Judge Macaron, issued his Order, Custody Order, and Findings of Fact and Conclusion of Law on August 1, 2000 ("Orders"). A Memorandum Order of March 28, 2000 ordered the Arbitrator/Special Master, after the trial on the merits, to hold a hearing on child support as well as other issues, page 1, #3; page 2, #8; page 3, #11. Six (6) months later, without holding the ordered hearing, the Arbitrator/Special Master issued a DECISION OF THE ARBITRATOR on February 1, 2001. Petitioner verbally protested the lack of a hearing and the Arbitrator/Special Master subsequently tolled the date for filing objections. Ten (10) months after the initial decision and sixteen (16) months after the "Orders", and again without setting or holding a hearing, the Arbitrator/Special Master, issued a SUPPLEMENTAL DECISION OF THE ARBITRATOR on December 11, 2001. (The two decisions of the Arbitrator are hereafter referred to as "Decisions".) Both Petitioner and Respondent filed timely objections to the "Decisions" on December 21, 2001 per the Rules of Civil Procedure for New Mexico District Courts, Article 6, Trials, Rule 1-053, E(2) **App. 19**, and Petitioner also filed a motion on December 21, 2001 to modify the "Decisions". During the sixteen (16) months between Judge Macaron's "Orders" and the Arbitrator/Special Master's "Decisions", Judge

Macaron transferred to another judicial section. The case was assigned to Judge Loughren, but no hearing was set as required by the Rules of Civil Procedure for New Mexico District Courts, Article 6, Trials, Rule 1-053, E(2), supra. Because of the New Mexico District Court Rules of Appellate Procedure 12-201, the Petitioner was forced to file an Appeal of Necessity to prevent the "Decisions" from becoming final on the basis of judicial inaction. The Appeal of Necessity was filed February 11, 2002. However, the New Mexico Appeals Court ruled the "Decisions" were not final because Judge Loughren had scheduled a hearing for a status conference. Thus Petitioner's right of appeal was preserved.

On December 2, 2002, twenty-eight (28) months after entry of the "Orders" of Judge Macaron, and twelve (12) months after the Arbitrator's "Decisions", Judge Loughren signed a Minute Order, on his last day in office, approving the "Decisions" without ever setting a hearing to consider Petitioner's and Respondent's objections to the Arbitrator's "Decisions".

Petitioner timely filed an appeal of Judge Loughren's Minute Order on December 30, 2002. The New Mexico Court of Appeals entered its Memorandum Opinion on June 6, 2003 (Opinion). Petitioner timely filed a Petition for Writ of Certiorari to the New Mexico Supreme Court on June 26, 2003. The New Mexico Supreme Court denied the Writ of Certiorari on August 4, 2003.

The decision below raises important and recurring questions related to whether the State of New Mexico systematically denies due process to a specific class of litigants and whether such systematic denial of due process is in conflict with federal law, namely 42 U.S.C. § 667

and 45 C.F.R. 302.56 and the U.S. Constitution's due process requirements of the Fourteenth and Fifth Amendments.

The decision below also conflicts with other state's appellate court rulings and federal preemption related to establishment of child support orders.

Furthermore, the decision below did not consider the important public policy issue of how criminalization under 18 U.S.C. § 228 (that require fines and imprisonment for delinquent child support orders) and the Bradley Amendment (42 U.S.C. § 666(a)(9)(c), which makes any arrearage forever due) increases the burden on states to meet the due process requirements mandated by federal law in establishing child support awards.

Finally, there is the question of whether New Mexico's statutes are so vague that they offer no meaningful guidance for litigants and judges in adjudication of child support awards that effectively deny litigants' due process of law.

REASONS FOR GRANTING THE PETITION

I. CRIMINALIZATION OF DELINQUENT CHILD SUPPORT ORDERS RAISES THE BURDEN OF PROOF TO PROTECT THE DUE PROCESS OF CHILD SUPPORT LITIGANTS.

Petitioner raised the question of Congress' criminalization of delinquent child support awards in Petitioner's DOCKETING STATEMENT filed March 29, 2003, page 16, 2nd paragraph and more extensively in Petitioner's APPELLANT'S MEMORANDUM IN RESPONSE TO

PROPOSED SUMMARY DISPOSITION OF MARCH 3, 2003.

The Appellate Court did not address or make a determination as to whether Congress' criminalizing delinquent child support increases the burden of proof on the state to protect a litigant's right of due process.

This issue is raised under the due process clause of the Fourteenth and Fifth Amendments of the U.S. Constitution.

The "criminalization" of individuals who are delinquent in court ordered child support became effective as of October 1992, when Congress passed 18 U.S.C. § 228 as part of the *Child Support Recovery Act* of 1992.

Specifically, Federal Statute 18 U.S.C. § 228 c. (1) & (2) states:

> *"In the case of a first offense under subsection (a) (1), a fine under this title, imprisonment for not more than 6 months, or both and*
>
> *in the case of an offense under paragraph (2) or (3) of subsection (a), or a second or subsequent offense under subsection (a) (1), a fine under this title, imprisonment for not more than 2 years, or both."*

Federal Statute 18 U.S.C. § 228 (e) further states:

> *"with respect to an offense under this section, an action may be required of and prosecuted in a District Court of the United States for –"*

The possibility of imprisonment and fines under 18 U.S.C. § 228 gives strong support for a higher burden of proof on the state to protect a litigant's right of due process

in child support litigation. Further support for a higher burden of proof on the state to protect litigants' right of due process is found in the Bradley Amendment, 42 U.S.C. § 666(a)(9)(c) [P.L. 99-509 (October 21, 1986)-subsection B, Section 9103, *Requirement of Statutorily Prescribed Procedures to Prohibit Retroactive Modification of Child Support Arrearages]* that states:

> *"(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)–*
>
> *(A) a judgment by operation of law, with full force, effect, and attributes of a judgment of the State, including the ability to be enforced,*
>
> *(B) entitled as a judgment to full faith and credit in such State and in any other State, and*
>
> *(C) not subject to retroactive modification by such State or by any other State; (Emphasis added)*
>
> *except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor."*

The effect of the Bradley Amendment is to make any court ordered support that is in arrearage forever due, without the possibility of modification for any reason,

except on the basis of a pending previously filed motion to modify. Following implementation of the Bradley Amendment [42 U.S.C. § 666(a)(9)(c)] Congress in 1988 amended 42 U.S.C. § 667, *State Guidelines for Child Support Award*, to require States to establish a right to rebut the statutory presumptive amount of child support and required states to establish objective criteria to ensure that awards are correct and not unjust or inappropriate because once the child support order becomes final, it is subject to criminal punishment if there is a delinquency in payment.

U.S. Supreme Court cases that appear to be applicable include *Mine Workers v. Bagwell*, 512 U.S. 821 (1994) and *Hicks v. Feiock*, 485 U.S. 624 (1988). Both cases consider the distinction between civil and criminal contempt. In *Mine Workers v. Bagwell*, supra, 618, quoting *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1974) "A 'flat unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." And *Mine Workers v. Bagwell*, supra, 617, quoting *Hicks v. Feiock*, supra, "Criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." 18 U.S.C. § 228 is not conditional and its only options are a fine or imprisonment or both for an initial or subsequent offense. The above cases hold that 18 U.S.C. § 228 is "Criminal" and proceedings require the protection of criminal due process. The issue raised for consideration by this case is whether the criminal due process requirement shall be applicable at the initial adjudication of child support awards and, if not, in a criminal hearing on enforcement of delinquent child

support awards, must the initial child support hearing be reexamined to determine whether litigants' right to due process was met.

A. Criminalization of delinquent child support is enforceable through federal district court.

There have been prosecutions under 18 U.S.C. § 228. In the United States Court of Appeals for the Fourth Circuit, *United States of America v. Ralph Howard Rich*, (2003) No. 03-4023, enforcement under the Child Support Recovery Act and 18 U.S.C. § 228 was upheld. Also, the U.S. 2nd Circuit Court of Appeals, *USA v. King*, (2002), No. 01-1141, the statute was held enforceable. See also *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Jones*, 529 U.S. 848 (2000), and a 4th Circuit decision, *United States v. Najjar*, 300 F.3d 466, 486 n.8 (2002).

B. Criminalization of delinquent child support demands a higher burden of proof for due process.

The burden of proof in criminal matters has always been higher than in civil matters. Congress recognized that child support awards are inextricably tied to the delinquency in payment and criminalization when it amended 42 U.S.C. § 667 in 1988 to make the presumptive child support award a rebuttable presumption. But to Petitioner's knowledge this Court has never considered the burden of proof a state must achieve when establishing a child support order through civil adjudication, that becomes fixed by the Bradley Amendment [42 U.S.C. § 666(a)(9)(c)],

and if an order then becomes delinquent, criminalization occurs and the obligor can be fined or imprisoned under 18 U.S.C. § 228. Thus, criminalization of a delinquent child support order raises constitutional issues regarding the burden on the state to protect a litigant's due process when establishing a child support order.

II. LITIGANTS' DUE PROCESS RIGHTS ARE DENIED BY NEW MEXICO STATUTES THAT ARE SO VAGUE THAT THEY PROVIDE NO MEANINGFUL OR OBJECTIVE CRITERIA FOR ESTABLISHING OR REBUTTING CHILD SUPPORT AWARDS.

This issue was preserved in the DOCKETING STATEMENT, filed January 29, 2003, page 21 with discussion from pages 17-21.

The Appellate Court "Opinion" ignored the issue of vagueness.

This issue is raised under the due process clause of the Fourteenth and Fifth Amendments of the U.S. Constitution.

An examination of NMSA 1978 §§ 40-4-11.1, 40-4-11.2 and 40-4-11.3 **App. 21** demonstrates that they are impermissibly vague in establishing child support awards and thus, violate 42 U.S.C. § 667 **App. 15** and the relevant regulation, 45 C.F.R. 302.56. **App. 17** NMSA 1978 § 40-40-11.1(A) states "there shall be a rebuttable presumption", but provides no criteria or definition to determine when a litigant may rebut. NMSA 1978 § 40-4-11.1(B)(1) requires the state to "establish as state policy an

adequate standard of support" but does not define "adequate". NMSA 1978 § 40-4-11.2 states "substantial hardship" may justify a deviation but does not define or list criteria for what constitutes "substantial hardship". A separate section, NMSA 1978 § 40-4-11.1(J), **App. 21** does indicate that an award of 40% or more of gross income shall be a presumption of substantial hardship but such criteria is mathematically impossible to achieve under the current child support guidelines and therefore is not an objective criteria.

The New Mexico Statutes in other issues of child support have great clarity. For instance, "gross income" is defined in multiple subparts of NMSA 1978 § 40-4-11.1 (C)(1),(b), (c), (d), and (e) in such a manner that there is no doubt what constitutes "gross Income". **App. 21**

The lack of criteria or definition of "unjust" or "inappropriate" or "adequate child support" or "correct" in NMSA 1978 §§ 40-4-11.1, 40-4-11.2 or 40-4-11.3 is a serious handicap for litigants and judges. Criteria are required by 42 U.S.C. § 667(b)(2) **App. 15** and 45 C.F.R. 302.56(g). **App. 17**

This Court has discussed vagueness in laws in *Grayned v. City of Rockford*, 408 U.S. 104 at 108-109, 92 S.Ct. 2294 (1972):

> *"Vague laws offend due process in two respects. First, they fail to provide persons targeted by the statute with "a reasonable opportunity to know what conduct is prohibited so that [they] can act accordingly." Second, by failing to provide explicit standards for those who apply them, vague laws "Impermissibly delegate basic policy matters to policeman, judges, and juries for resolution on a ad hoc and subjective basis, with the attendant*

> *dangers of arbitrary and discriminating behavior."*

And

> "a statute must contain an explicit and ascertainable standard to present those charged with enforcing the statute's provision from engaging in 'arbitrary and discriminatory' enforcement."

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 44, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) "Due process requires a State provide meaningful standards to guide the application of its laws." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*, 455 U.S. 489, at 499, 102 S.Ct 1186, 71 L.Ed.2d 362 (1982), "When a law threatens to inhibit the exercise of constitutionally protected rights, such as the present case, the Constitution demands that courts apply a more stringent vagueness test." See also *Karlin v. Foust*, 1888 F.3d 466 (7th Cir. 1999); *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999). *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000), examined a statute prohibiting "Aggressive Panhandling" and held it was not vague because it had the following definition and criteria: "[f]ollowing behind, or ahead, or alongside a person who walks away from the panhandler after being solicited". Clarity such as this is missing in NMSA 1978 § 40-4-11.1-3 and without definitions or criteria New Mexico's statutes are subject to misinterpretation by judges or hearing officers who establish child support orders.

This Court should determine whether NMSA 1978 § 40-4-11.1-3 are impermissibly vague when tested against 42 U.S.C. § 667 and 45 C.F.R. 302.56 and particularly when criminalization may occur if there is a delinquent child support order. Because criminalization occurs with a

delinquent child support order, clear criteria and definitions in statutes used to establish child support orders are necessary to protect due process. A litigant's right to procedural due process is abrogated when statutory language is so vague as to provide no meaningful guidance in a judicial hearing. Procedural due process is a compelling and important issue.

III. IN ESTABLISHING CHILD SUPPORT AWARDS, NEW MEXICO DOES NOT PROPERLY APPLY FEDERAL LAW PROMULGATED UNDER ARTICLE 1, SECTION 8, CLAUSE 1 OF THE U.S. CONSTITUTION AND THUS FEDERAL PREEMPTION IS REQUIRED.

This issue was preserved in Petitioner's DOCKETING STATEMENT, pages 10-11 and pages 14-22.

The "Opinion" discussion of federal preemption is on pages 10-11 and states "Respondent's memorandum cites to federal regulations that discuss the matter of child support very generally, but we see nothing in these regulations that requires us to hold that they preempt state law."

This issue was raised under the Supremacy Clause of federal law and regulations promulgated under the Spending Power under Article 1, Section 8, Clause 1 of the U.S. Constitution. Also, other state jurisdictions have ruled differently than New Mexico in the matter of federal preemption of state's child support guideline statutes.

Federal preemption applies in this case because the Personal Responsibility and Work Opportunity Reconciliation Act (PROWRA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), also known as "Welfare Reform", replaced the Aid to Families with Dependent Children (AFDC) program

with the Temporary Assistance to Needy Families (TANF) program. Title III amended the Child Support Enforcement Program, Title 42, Chapter 7, Subchapter IV, part D, also know as "IV-D" to require that state IV-D programs must provide child support services to all custodial parents who receive temporary assistance under TANF or Medicaid or request IV-D assistance. Federal money sent to states under these programs that participate in this program is an entitlement made under the Spending Power Clause of the U. S. Constitution, U.S.C.A. Const. Art. 1, Section 8, Cl. 1. New Mexico voluntarily participates in the TANF program and Medicaid programs and therefore, is required to adhere to the requirements in the Child Support Enforcement program of the IV-D regulations, 42 U.S.C. §§ 651-669. If states do not follow mandatory federal regulations, federal preemption is required as explained below.

A. New Mexico's statutes do not comport fully with federal law, thus federal preemption is required.

Guidelines for Setting Child Support Awards, 45 C.F.R. 302.56 (e) & (f) & (g) & (h) **App. 17**, the relevant federal law related to New Mexico's child support statutes, states:

> "(e) The state *must review*, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once *every four years* to ensure *that their application results in the determination of appropriate child support award amounts*." (Emphasis added)
>
> "(f) Effective October 13, 1989, the state must provide that *there shall be a rebuttable presumption,*

in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this *section is the correct amount of child support* to be awarded."(Emphasis added)

"(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that *the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate* in a particular case shall be sufficient to rebut the presumption in that case, as determined *under criteria established by the State*. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guideline." (Emphasis added)

"(h) As a part of the review of a State's guidelines required under paragraph (e) of this section, a *State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods*, on the application of, and deviations from, the guidelines. *The analysis of the data must be used in the State's review of the guidelines* to ensure that deviations from the guidelines are limited." (Emphasis added)

NMSA 1978 § 40-4-11.1 Child Support Guidelines **App. 21** violate 42 U.S.C. § 667 and 45 C.F.R. 302.56. Specifically, NMSA 1978 § 40-4-11.1(A) has no definition or criteria or even a requirement for a "correct award" of

child support, as required by 45 C.F.R 302.56 (f). NMSA 1978 § 40-4-11.2 has no criteria "established by the state" to determine what constitutes "unjust" or "inappropriate" as required by 45 C.F.R. 302.56 (g). Furthermore, New Mexico statutes have no requirement to consider economic data on the cost of raising children and to use the data on the cost of raising children in the State's review of the guidelines every four years as required by 45 C.F.R. 302.56 (e). NMSA 1978 § 40-4-11.2 states no criteria for what constitutes "substantial hardship". NMSA 1978 § 40-4-11.1(B)(1) states no criteria for what constitutes "adequate" child support. NMSA 1978 § 40-4-11.3 requires the State to review statutory guideline amounts every four years to ensure an "appropriate" amount of child support as required by 45 C.F.R. 302.56 (h), but Petitioner has found no record of such review by New Mexico during the last eight years. And, there are no criteria for rebutting the presumptive guideline support amounts "as determined under criteria established by the state" as required by 45 C.F.R. 302.56(g).

The only criteria established by New Mexico for deviating from the statutory guideline child support is when it "requires a person to pay another person more than 40% of his *gross income*" (Emphasis added), which is mathematically impossible under the calculations of NMSA 1978 § 40-4-11.1(k), **App. 21** and thus is an illusionary, false and misleading criteria.

B. The State of New Mexico has not disclosed the scientific basis and assumptions used for establishing guideline child support awards.

New Mexico also has not disclosed the scientific basis and assumptions used in developing its statutory guideline amounts of child support such that the facts and assumptions are reviewable by an expert to determine if the scientific basis for the guideline presumptive amounts is valid. Thus, if unsupported by any scientific basis, the guidelines would not be enforceable. See *Kumho Tire Co, LTD, et al. v. Carmichael et al.*, U.S. Supreme Court, No. 97-1709 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

C. The decision below, that federal preemption does not apply, is at variance with decisions from other state jurisdictions.

New Mexico's child support statutes and the "Opinion" are at variance with other jurisdictions and federal appellate decisions holding that federal preemption is required when state child support agencies that accept funding under the Spending Power Clause do not precisely follow federal statutes and regulations. *C.K. v. New Jersey Department of Health and Human Services*, 92 F.3d 171,178; 1996 U.S. App. Lexus 20068, No. 95-5454, under A. STATUTORY BACKGROUND held, *"the state will receive federal matching funds if it implements an AFDC plan that* ***comports fully*** *(emphasis added) with the Social Security Act."* Also, see *Sullivan v. Stroop*, 496 U.S. 478 (1990), and *South Dakota v. Dole*, 483 U.S. 203 (1987) and *Hodges v. Thompson*, 4th Cir. Ct. of App., No. 00-2512, decided November 15, 2002, citing *Hodges v. Shalala*, 121

F.Supp.2d 854 (D.S.C. 2000). New Mexico does not have a choice to adopt part of the applicable federal statutes and regulations without following mandates of all applicable parts. Also, *Rose on behalf of Clancy v. Moody*, 629 N.E.2d 378, 380 (N.Y. 1993), speaks to the issue of state compliance with these federal statutes and regulations *"each participating State is required to adopt State-wide guidelines in connection with child support awards as a condition for the State's receipt of Federal funds".*

In *In Re Marriage of Gilbert*, 945 P.2d 238, 243 (Wash. App. Div. 1 1997) the court discussed awards that are too high and stated:

> *"Although we readily agree that children are the primary intended beneficiaries of the rebuttable presumption requirement, children are not well served when courts impose unrealistically high, and therefore uncollectable, child support awards."*

When referring to state child support statutes, *Gorrie v. Bowan*, 809 F.2d 508, 520 (8th Cir. 1987) stated *"the supremacy clause obliges it to comply with federal . . . requirements."*

45 C.F.R. 302.56 (g) requires that any presumptive amount of child support is a rebuttable presumption **App. 17** and NMSA 1978 § 40-4-11.1(A) **App. 21** states that the statutory child support amount is a rebuttable presumption.

D. New Mexico's Appellate Court decision in *Leeder v. Leeder* violates federal law by not allowing rebuttal of the presumptive amount of child support.

The right to rebut in New Mexico appears to have been voided by the decision in *Leeder v. Leeder*, 118 N.M. 603, 605, 884 F.2d 449, that stated:

> *"The guidelines are not intended to reflect what the parents have in fact been spending for the care, maintenance, and education of their children. Rather they set a presumptive figure for what the parents should be spending."*

And page 605 stated:

> *"We conclude that the guidelines are presumed to provide the proper amount of child support and that Section 40-4-11 (A) (?) is ordinarily satisfied if the court sets forth the computations [***6] made under the guidelines."*

Thus in New Mexico, the presumptive guideline amount of child support is not rebuttable if computed under the guidelines. In the present case, in the "Opinion", the court ignored the conflict between *Leeder v. Leeder*, supra, and NMSA 1978 § 11-4-11.1 (A) that requires a rebuttable presumption, even though Petitioner raised the contradiction in his DOCKETING STATEMENT, filed January 29, 2003, pages 18-19.

E. New Mexico's Appellate Court decision in *Leeder v. Leeder* is in conflict with decisions of other state jurisdictions.

New Mexico's decision in *Leeder v. Leeder*, supra is in conflict with decisions of other state courts of last resort

and federal appellate courts. In *Rose on behalf of Clancy v. Moody*, 629 N.E.2d 378, 381 (NY-1993) citing *Matter of Rose v. Haney*, 592 N.Y.S.2d 531 states "42 U.S.C. § 667 (b)(2) directly prohibits a state from enacting child support guidelines which permit no rebuttal of the amount awarded." *In re Marriage of Gilbert*, 945 P.2d 238 (Wash. App. Div. 1 1997) ruled in favor of federal preemption of a state's mandatory minimum child support of $25.00, "even if the rebuttal reduced the guideline amount to zero due to inability to pay." Additionally, *Jackson v. Rapps*, 947 F.2d 332, 336, 1991 U.S. App. Lexis 24734 App. Lexis 320, citing *Gorrie v. Bowen*, 809 F.2d 508, 520 (8th Cir. 1987) stated, "The state voluntarily accepts conditions imposed by Congress and once it chooses to do so, the Supremacy Clause obliges it to comply with all federal AFDC requirements."

F. New Mexico's decision in *Leeder v. Leeder* that prohibits rebuttal of child support awards is in conflict with the U.S. Constitution and decisions of this Court.

This court has also discussed the issue of statutory presumptions, *Bailey v. State of Alabama*, 219 U.S. 219, 225 (1911), and stated:

> "The power to create presumptions is not a means to escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from it by authority of the Federal Constitution, ..."

and further stated:

> "If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either

> criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all the facts bearing upon the issue, there is no ground to hold that due process of law has been denied him."

Bandini v. Superior Court, 284 U.S. 8, 18-19 (1931), held that presumptions must not deny persons a reasonable opportunity to present specific circumstances to rebut the presumption, as follows:

> "The state may provide proof of a particular fact, or several facts taken collectively, shall be *prima facie* evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense."

Leary v. U.S. 395 U.S. 6 (1969), *Tot v. U.S.*, 319 U.S. 463 (1943)and *Levine v. U.S.*, 424 U.S. 577 (1976), support the holding in *Bandini*, supra, that an absolute presumption constitutes a denial of procedural due process in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. Thus New Mexico's court of last resort has decided an important federal question in conflict with the decisions of this Court.

G. Congress recognized that rebuttal of presumptive statutory child support guidelines are required because not all child support awards are appropriate.

The legislative history of P.L. 98-378, page 40, Guidelines for Child Support Awards (Section 17 of the bill), indicates Congress recognized that unrealistic awards may occur:

> "COMMITTEE AMENDMENT-Although the child support enforcement program has greatly strengthened the ability of children to have support orders established and collected, there remains a continuing problem that the amounts of support ordered are in many cases unrealistic. This frequently results in awards which are much lower than what is needed to provide reasonable funds for the needs of children in the light of the absent parent's ability to pay. In some instances, however, there are also awards which are unrealistically high."

Congress subsequently addressed the problem of unrealistically low or high awards by making presumptive amounts of child support rebuttable under 42 U.S.C. § 667(b)(2) **App. 15** and 45 C.F.R. 302.56 (f). **App. 17**

IV. THE STATE OF NEW MEXICO DENIES ALL LITIGANTS DUE PROCESS OF LAW BECAUSE IT DENIES A HEARING IN THE ESTABLISHMENT OF CHILD SUPPORT AWARDS.

Petitioner preserved this issue by raising it in the DOCKETING STATEMENT, filed January 29, 2003, pages 7-19.

In ratifying the district court's denial of a hearing, the "Opinion" at page 6, stated, "Due process is a flexible concept." Then on page 7, "Due process does not always require an evidentiary hearing" and finally on page 10 the "Opinion" concluded, "We hold that Respondent has not demonstrated a denial of due process." Thus Petitioner was denied the right to a hearing in violation of the Fourteenth and Fifth Amendments of the Constitution of the United States.

This issue is raised under the due process clause of the Fourteenth and Fifth Amendments of the U.S. Constitution.

The record proper reflects no hearing was set to hear the "Objections", no briefs were requested, and no opportunity was provided to argue child support before the district court or the Arbitrator/Special Master.

Ten (10) days after the Special Master/Arbitrator filed his "Decisions", both parties timely filed objections and Petitioner filed his motion to modify the Arbitrator/Special Master's "Decisions", but the district court never set any hearing to consider the parties' objections to the "Decision" as required by New Mexico District Court RCP 1-053.E.(2). **App. 19**

Judge Loughren, without any prior notice to the parties, entered a Minute Order on December 2, 2002, his last day in office, stating there was a hearing, in contradiction to the Case History for the District Court (Record Proper) and the facts of the case, and approved the Arbitrator/Special Master's "Decisions". The Record Proper, in the matter of *Garner v. Garner*, 89-04112 has no setting to hear Petitioner's and Respondent's objections to the "Decisions" and Judge Loughren erred when he indicated

there had been "various hearings" on the objections and approved the "Decisions". Therefore, the Appellate Court apparently misunderstood the facts in the case and because there was never a hearing set and no briefs were filed, the cases of *Sandoval v. Martinez*, 109 N.M. 5, 12-13, 780 P.2d 1152, 1159-60 (Ct. App. 1998); *Bilbao v. Bilbao*, 102 N.M. 406, 407, 696 P.2d 494, 495 (Ct. of App. 1985), and *United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155, 236-38, 629 P.2d 231, 312-14 (1980) relied upon in the "Opinion" are distinguished and do not apply.

A. The holding below that a Court may deny a litigant a hearing in the establishment of a child support order is in conflict with this Court's decisions.

This Court has spoken on the issue of due process on multiple occasions and in *Little v. Streater*, 452 U.S. 1, 3 (1981) stated:

> *"The Fourteenth Amendment provides in part: 'No State shall . . . deprive any person of life, liberty, or property without due process of law . . .' "*

In *Little v. Streater*, supra 4, quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976) stated:

> *"[I]dentification of the specific dictates of due process generally requires consideration of three factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; finally, the Government's interest, including the function involved and the fiscal and administrative burdens*

> *that additional or substitute procedural requirements would entail."*

In *Gannis v. Ordean*, 234 U.S. 386, 394, this Court held that "A fundamental requirement of due process is the opportunity to be heard"; and in *Boddie v. Connecticut, et al.*, 401 U.S. 371, 375 (1971) stated "The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather the State owes to each individual that process which is due." and *Boddie*, Ibid. 374 also held that marriage and divorce are compelling individual interests that must be litigated in the judicial forum and that an evidentiary hearing is required. This Court further stated in *Mathews v. Eldridge*, 424 U.S. 319, 325 (1976):

> *"This court consistently held that some form of hearing is required before an individual is finally deprived of a property interest."*

And

> *"The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."*

It is an egregious violation of basic constitutional rights for New Mexico's judiciary to turn a blind eye to due process. The opportunity to be heard is a vital part of due process. Barriers that prevent the right to be heard violate the Fourteenth and Fifth Amendments of the U.S. Constitution. In this case, no hearing was set and no hearing occurred.

The "Opinion", if allowed to stand, casts doubt on the Fourteenth and Fifth Amendments' guarantees provided to

all past, present and future litigants in New Mexico and is a compelling reason for this Court to grant Certiorari.

SUMMARY:

This case is about due process in child support litigation. First, there is the important question of how statutory prohibition to modify a child support order and subsequent criminalization of delinquent child support orders may affect the burden of proof in hearings that establish child support. Next, there is the important question of whether New Mexico's statutes are so vague and devoid of objective criteria and definitions that judges, and hearing officers are left without meaningful guidance of how to meet litigants' Fourteenth and Fifth Amendments' rights of due process and whether these deficiencies mandate federal preemption of New Mexico's child support statutes by regulations promulgated under the Spending Power Clause, Article 1, Section 8, Clause 1 of the U.S. Constitution. A related issue is whether New Mexico's decision in *Leeder v. Leeder*, supra, that held that when child support is calculated in accordance with the state guidelines, it is the correct amount and is not rebuttable and whether this violates federal law, especially since 42 U.S.C. § 667(b)(2) and 45 C.F.R. 302.56(f) mandates the right to rebut, and thus, federal law should preempt New Mexico law. And finally, there is the issue of denial of a hearing in the establishment of a child support order. A hearing is one of the most basic rights accorded litigants, the right to be heard. Yet, New Mexico's Appellate Court ratified the numerous due process violations in this case and by so doing, raise concerns about New Mexico's commitment to due process for child support litigants.

These issues are important because federal child support legislation applies to all minor children of divorce and child support litigants may be the largest class of litigants in the United States and includes 16 million children and $92.3 billion in delinquent payments. Even in a low population state such as New Mexico, child support litigation includes 70,294 children and $539 million and thus is an important issue for the state. **App. 20**

And, this case is much more than one litigant's concern with due process in a single case of child support litigation. It is about judicial blindness to the rule of law that adversely affects the due process of all child support litigants in New Mexico. Federal law has been violated and Fourteenth and Fifth Amendments' rights have been abrogated and are presently unavailable to child support litigants in New Mexico. This is particularly troublesome when a support order can never be modified and there may be subsequent criminalization of a delinquent child support order.

All these reasons are compelling and important reasons why Certiorari should be granted by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

PRAYER:

1. Issue a Writ of Certiorari to the Appellate Court of New Mexico.
2. Hold that the Spending Powers Clause, Article I, Section 8, Clause 1 of the United States Constitution

mandates preemption of New Mexico's child support statutes and court decisions that conflict with federal law.

3. Hold that under the Fourteenth and Fifth Amendments of the United States Constitution, New Mexico's child support statutes are impermissibly vague and order that New Mexico's child support statutes must contain clear, specific, and reasonable criteria for when deviation from statutory guideline child support must be considered, such that due process is not denied a litigant.

4. Hold that under the Fourteenth and Fifth Amendments of the United States Constitution, criminalization under 18 U.S.C. § 228 places a greater burden of proof on states to insure child support litigants' due process rights, as defined by federal law, are protected in all phases of child support litigation.

5. Hold that under the Fourteenth and Fifth Amendments of the United States Constitution, a hearing is required in child support litigation.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

KELLY GARNER,

Petitioner-Appellee,

vs.

RONNIE GARNER,

Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
JAMES LOUGHREN, District Judge

PETER JOHNSTONE
Albuquerque, New Mexico

MURIEL McCLELLAND
Albuquerque, New Mexico — Attorneys for Petitioner-Appellee

ROBERT S. SIMON
Albuquerque, New Mexico — Attorney for Respondent-Appellant.

MEMORANDUM OPINION

(Filed Jun. 6, 2003)

ROBINSON, Judge.

Respondent appeals the Supplemental Decision of the Arbitrator, entered December 11, 2001 **[RP 961]**, adopted by the District Court's Minute Order of December 2, 2002. **[RP 1238]** Our notice proposed to affirm on Issues 1-5 and reverse on Issue 6. **[Ct. App. file – top left document]** Respondent responded with a timely Memorandum In Opposition **[Ct. App. file – top right document]** Petitioner did not respond to our proposal to reverse on Issue

6, and for the reasons discussed in our notice, we reverse and remand on Issue 6. Concerning Issues 1-5, we are not persuaded by the arguments in Respondent's memorandum, and affirm on those issues.

References in this opinion to the record proper before page 1160 refer to the record proper in Ct. App. No. 22,887. References after page 1160 refer to the supplemental record proper filed in this appeal, Ct. App. No. 23,761.

Issue 1: The appropriate worksheet

Respondent argues that the Arbitrator incorrectly calculated the percentage of Petitioner's time sharing and used the wrong worksheet in calculating child support. **[DS 5-6; MIO 1-7]** He argues that worksheet A should have been used because Petitioner falls below the 35% cut off for worksheet B. *See* NMSA 1978, §40-4-11.1(D)(3) (1995).

We review the setting of child support for an abuse of discretion, but the trial court's discretion must be exercised in accordance with the child support guidelines. *See Styka v. Styka*, 1999-NMCA-002, ¶8, 126 N.M. 515, 972 P.2d 16.

The district court ordered that in a two-week period Petitioner would have Travis Garner beginning at 8:00 am. on Wednesday until 7:30 p.m. on the following Sunday. During the second week, Respondent would have Travis the entire week except Petitioner would have dinner with Travis on Wednesday, and would have him from the time school ended until 7:30 p.m. **[RP 880-86]** The Arbitrator also considered that Petitioner would have

Travis for one week during spring break, which added 168 hours to the calculation.

We calculate the number of hours from 8:00 a.m. Wednesday morning until 7:30 p.m. on Sunday evening as 107.5 hours. We are unsure exactly what time the school day ends, but we assume it ends around 2:30 p.m. Therefore, we consider that on the Wednesdays when Petitioner has dinner with Travis, she is entitled to an additional 5 hours, bringing the total time for a two-week period to 112.5 hours. We then consider that Petitioner has Travis for one solid week during spring break, which totals 168 hours. That equals approximately 3.2 hours per week. Therefore, we add 6.4 hours to the two-week period, which results in a total of 118.9 hours every two weeks. There are 336 hours in a two-week period. 118.9 equals 35% of 336. Consequently, worksheet B is applicable and the Arbitrator's calculation is correct.

Respondent takes issue with our conclusion that Petitioner is entitled to credit for the time beginning on alternate Wednesdays at 8:00 a.m. **[MIO 3-7]** He contends that if we subtract the time Travis is at school that day, the Petitioner's responsibility begins at 4:00 p.m., then Petitioner's share of responsibility is reduced below 35%. He argues that *Boutz v. Donaldson*, 1999-NMCA-131, ¶¶ 18-19, 128 N.M. 232, 991 P.2d 517, prohibits Petitioner from receiving credit beginning on Wednesday at 8:00 a.m. We disagree.

In this contentious divorce case, the court provided for definite periods of responsibility. **[RP 880]** The court made a specific determination that Petitioner's period of responsibility began on the alternate Wednesday at 8:00 a.m. Thus, if Travis had been ill on that day, and not gone

to school, or had a doctor's appointment, or for some other reason was not in school, the order clearly provided that Petitioner would be responsible. Under Respondent's view, either he, or no one, had any responsibility on the alternate Wednesdays beginning at 8:00 a.m. and until 4:00 pm. Given the obvious acrimony between the parties, the court could not allow a gap in responsibility, and it did not. It specifically determined that as of 8:00 a.m. on alternate Wednesdays Petitioner was the responsible party. It is appropriate, then, to also give her credit for that time.

The Arbitrator made the shared responsibility calculation based on the actual hours of each parent's period of responsibility, and we see no abuse of discretion and no violation of statute in such a reasonable approach. Nor do we agree that *Boutz* prohibits such an approach. We did not hold in *Boutz* that a parent can never receive credit for the time the child has left and gone to school for the day. We only held that in that case Father did not demonstrate he was entitled to credit for the time after the children left his home in the morning and attended school. Here, contrast, we conclude that the specific determination that Petitioner's period of responsibility begins at 8:00 a.m. does demonstrate that she is entitled to credit.

Respondent also relies on NMSA 1978, §40-4-11.1(G) (1995) to argue that Petitioner should not be given credit for the 5 hours she spends with Travis at dinner on alternate Wednesdays because it does not constitute a 24-hour day . **[MIO 4]** We disagree that §40-4-11.1(G) prohibits Petitioner from receiving credit for the 5 hours. We interpret §40-4-11.1(G) to reflect the legislature's intent that the percentage should be calculated as an average over the period of a year, instead of focusing on a narrow time

period that in a particular case would not accurately measure shared responsibility.

Here, the Arbitrator's approach was based on the actual hours each parent had responsibility. We disagree with Respondent that such a calculation is in violation of Section 40-4-11.1(G). Moreover, if we were to accept Respondent's argument, then Respondent is wrongly receiving credit for 8 hours, from midnight to 8:00 a.m., on the Wednesdays Mother's period of responsibility begins at 8:00 a.m. Respondent would also be wrongly receiving credit for 4½ hours on the Sunday nights Travis is returned to him at 7:30 p.m.

Respondent argues that some of the spring break time would be actually Respondent's time. **[MIO 5]** We disagree. That could be said of every vacation period, and would apply equally to those vacations in which Respondent had Travis.

Respondent also relies on *Boutz* to argue that time sharing includes only time spent "in each home," not school time. **[RP 979, 986]** We reject this argument. Respondent's argument resembles a time-clock argument in which calculations of time spent with each parent in the home would become cumbersome and detailed to the point of being ridiculous. The determination of the applicable worksheet does not depend on neat calculations about how many hours the child is actually, physically in the home, or in the presence of the parent, and we do not read or interpret *Boutz* to require such an inflexible and unrealistic approach. Moreover, were we to apply Respondent's logic, he would not be entitled to credit for as much time, either, because Travis is not in his home or with him during all the hours Travis is at school.

In conclusion, we are not persuaded that the Arbitrator abused his discretion in the calculations he used, or that the Arbitrator's calculations are in violation of statute. The Arbitrator accepted the periods of responsibility set by the court, and made his calculations based on the actual hours each parent had responsibility. We find no abuse of discretion.

Issues 2 and 3: Due process

Respondent argues that the decision should be reversed because he was not given a hearing on whether Petitioner was underemployed (Issue 2). **[DS 6; MIO 7-10]** He also argues that he was being denied a hearing and could not present evidence to rebut the amount of child support set by the guidelines (Issue 3). **[DS 7-14; MIO 10-23]**

On March 28, 2000, the district court entered a Memorandum Order providing that after the trial on the child custody issues the Arbitrator "is requested to conduct a hearing regarding all pending child support issues." **[RP 573]** Respondent relies heavily on this language to argue that he never received a formal, evidentiary hearing, and therefore the Arbitrator's decision must be reversed. We have considered the arguments in the memorandum and disagree that reversal is required.

Due process is a flexible concept. *See United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155, 236-38, 629 P.2d 231, 312-14 (1980) (stating that the requirements of due process are not technical and no particular form of procedure is necessary, that the circumstances of the case dictate the requirements, and that the integrity of the fact-finding process and the basic fairness of the decision

are the principal considerations). Due process does not always require an evidentiary hearing. *See id.* (rejecting the argument that the lack of an evidentiary hearing required reversal of a discovery sanction because the parties had full opportunity to brief the facts and law); *Sandoval v. Martinez*, 109 N.M. 5, 12-13, 780 P.2d 1152, 1159-60 (Ct. App. 1989) (holding that due process does not always require an evidentiary hearing and that briefing was sufficient to present the issue for decision); *Bilbao v. Bilbao*, 102 N.M. 406, 407, 696 P.2d 494, 495 (Ct. App. 1985) (rejecting Husband's argument that he was denied due process by failure of the court to allow argument where the issues were briefed and considered by the court).

Respondent argues that the Arbitrator did not hold an evidentiary hearing on Respondent's argument that Petitioner was underemployed. **[MIO 9]** It appears, however, that Respondent vigorously presented written arguments, complete with facts, evidence, and law. For example, Respondent presented his argument that Petitioner was underemployed because she had a masters degree in business with concentration in accounting. Respondent argued to the Arbitrator that Petitioner's income should be considered to be what she would have earned had she worked in the accounting field. Respondent submitted an expert's evaluation from Meyners & Company to support Respondent's argument that a yearly income of $75,000.00 should be imputed to Petitioner. **[RP 999-1001, DS 4]** The Arbitrator clearly considered this argument, including the evidence offered by Respondent, and ruled on it. **[RP 965-67, 1033]** We hold that Respondent was sufficiently heard on this issue.

To the extent Respondent is arguing that Petitioner is underemployed, we disagree. It appears there was evidence that Petitioner has worked as a medical technologist for Tricor Reference Labs since 1990. She works 36 hours per week and earns $21.60 per hour, and is on call every other weekend. **[RP 417, 1014]** It does not appear Respondent disputed these facts. Instead, Respondent argued that Petitioner should work as an accountant with a national accounting firm because she has a masters degree in business with a concentration in accounting. **[RP 577]** The Arbitrator rejected this argument **[RP 966, 1033; 1052-53]** and we reject Respondent's argument, as well. We are not persuaded by Respondent's argument that because we would impute income to a physician who chose to work in a lower-paying job, we must impute income to Petitioner here. **[MIO 10]** Petitioner's situation is not analogous to a situation in which a doctor takes some other employment. It appears that Petitioner has never worked as an accountant and is not a certified public accountant. **[RP 417]** We hold that Petitioner has made reasonable, good faith efforts in her employment choices, that Respondent has shown no bad faith by Petitioner, and that the Arbitrator's decision on this issue is not an abuse of discretion. *See Boutz*, 1999-NMCA-131, ¶¶5-6 (holding that the special master did not abuse his discretion in refusing to impute additional income to the ex-wife when there was evidence that she had made reasonable, good faith efforts regarding employment and no bad faith had been shown).

Respondent also argues that he did not receive due process because he was not sufficiently heard on his claim that excessive child support was a reason to depart from the guidelines. He argues that New Mexico must recognize

excessiveness as a reason to depart from child support guidelines, and that a cap should be set at an amount determined to be adequate to support a child. **[DS 8-14; MIO 10-23]** Respondent presented this claim below. **[RP 292-93; 988-999]** The Arbitrator considered Respondent's excessiveness issue and ruled on it. **[RP 963-65; 1050-52]**

It appears that Respondent is required to pay Petitioner $1,251.00 per month for part of 2000, and $716.00 per month for the latter part of 2000 and all of 2001. **[RP 927-30]** The Arbitrator noted that the California legislature and courts have recognized a cap but New Mexico law does not. **[RP 964]** The Arbitrator also determined that the amounts required to be paid by Respondent did not approach the levels held to be excessive in the California cases. **[RP 965; 1050-52]**

Under New Mexico law, the guidelines are to be followed. The Legislature has provided a single exception for substantial hardship. *See* NMSA 1978, §40-4-11.2 (1989). California law is not dispositive, and Respondent's excessiveness argument has not been accepted by our Legislature. If our Legislature decides to do so it may amend the statute to include a "cap" on child support. Until it does so we will not adopt such a rule. *See Quintana v. Eddins*, 2002-NMCA-008, ¶24, 131 N.M. 435, 38 P.3d 203 (recognizing that it is the Legislature's prerogative to enact substantive law and that unless and until the Legislature changes the statute dealing with underemployment of a parent, this Court would not adopt the changes advocated by the husband).

The lack of validity of Respondent's "cap" argument further supports our conclusion that Respondent has not demonstrated that failure to hold an evidentiary hearing

requires reversal. Even assuming all of his evidence and argument on this point had been introduced at an evidentiary hearing, it provides no basis for relief because it would not support a departure from the guidelines.

Our review of the record persuades us that Respondent vigorously presented his arguments, evidence, and supporting authorities on these issues, and that the issues were considered and ruled on by the Arbitrator and the district court. We hold that Respondent has not demonstrated a denial of due process.

Issue 4: Federal preemption

Respondent argues that federal regulations preempt New Mexico's child support guidelines. **[DS 14-21; MIO 23-24]** The federal law on which Respondent relies appears to provide only that each state must have a set of child support guidelines and that irrebuttable guidelines are impermissible. **[RP 964; DS 13, 15]** Respondent also argues that the guidelines must allow for rebuttal of the presumption that the guidelines provide the correct amount of child support on a showing that the amount is "unjust or inappropriate in a particular case, as determined under criteria established by the State." **[DS 16]**

There is a strong presumption against preemption. *See Largo v. Atchison, Topeka & Santa Fe Ry. Co.*, 2002-NMCA-021, ¶6, 131 N.M. 621, 41 P.3d 347. Respondent has not determined that federal regulations on which Respondent relies preempt our guidelines. The federal regulations touch on the subject of child support, but they do not preempt the field. *See id.* ¶8 (stating that for preemption to apply the federal regulations must cover the same subject matter; it is not sufficient that they touch on

or relate to the subject matter). The federal regulations cited by Respondent do not preempt the field because they clearly state that they are leaving it to the states to establish the criteria for child support guidelines. **[DS 16]** Respondent's memorandum cites to federal regulations that discuss the matter of child support very generally, but we see nothing in those regulations that requires us to hold that they preempt state law. **[MIO 23-34]**

Respondent also argues that irrebuttable presumptions are invalid and that, because of this alleged flaw, our guidelines are in violation of federal law. **[DS 10-11; MIO 26-33]** We disagree with Respondent that the guidelines are irrebuttable. Our guidelines contain an exception for substantial hardship. Our guidelines do contain an avenue to rebut the award of child support, just not the "excessiveness" avenue Respondent desires. We also reject Respondent's suggestion that our guidelines are inadequate because they do not contain objective criteria to determine when the guidelines have been rebutted. The Legislature has expressed an objective criterion, providing a presumption that a child support award for one child exceeding 40% of the paying parent's gross income constitutes substantial hardship. *See* NMSA 1978, §40-4-11.1(J) (1995).

Respondent did not argue below that payment of child support presented a substantial hardship, and given that Respondent is a doctor making in excess of $200,000.00 per year **[RP 963]**, such an argument would have been difficult to sustain. Instead, Respondent chose to argue, and continues to argue, that a "cap" is objective and is therefore required. We disagree. Respondent has cited no cases holding that a "substantial hardship" exception has been struck down under the federal law he cites. We do

not agree that federal law requires us to strike down our guidelines or entitles Respondent to any relief here.

Issue 5: Effective date of the change in child support

Respondent argues that the Arbitrator erred in determining that child support should be applied retroactively to May 5, 1999, instead of to November 12, 1998. **[DS 22; MIO 34-35]**

May 5th was the date of the first motion of either party to modify child support. **[DS 22]** Respondent argues that the Arbitrator erred because the Arbitrator relied on a "phantom" local rule. **[MIO 34]** We are unpersuaded. Whether there is a local rule or not, under *Montoya v. Montoya*, 95 N.M. 189, 190, 619 P.2d 1233, 1234 (1980) it is the date of the filing of the pleading to modify child support that governs. We hold that under *Montoya* the Arbitrator's determination is correct.

Respondent argues that "unusual circumstances" required the Arbitrator to depart from *Montoya*'s general rule. He argues that the "unusual circumstances" are that it was his November 12th motion to modify child custody and time sharing that caused Petitioner to file her May 5th motion to modify child support. **[DS 22; MIO 34-35]**

We disagree that Respondent has demonstrated unusual circumstances. There is nothing unusual about parties to a divorce filing motions to modify child custody and time sharing, and motions to modify child support. Moreover, were we to adopt a rule in divorce cases that would make the governing date depend on who precipitated what action, we would be entering an uncertain and

unworkable procedural morass of finger pointing and recrimination. We decline to do so.

Issue 6: Arithmetic error in the calculation of child support

Respondent argues that the Arbitrator made an "arithmetic error" in the calculation of Petitioner's gross monthly income for 1999 used to calculate child support. **[DS 22-23]** Our notice proposed to agree with Respondent, and to reverse on this issue. Petitioner has not filed a response. Therefore, for the reasons stated in the notice, we reverse and remand for recalculation of child support using Petitioner's 1999 income.

For these reasons, we reject Respondent's arguments in Issues 1-5. We reverse and remand on Issue 6.

IT IS SO ORDERED.

/s/ Ira Robinson
IRA ROBINSON, Judge

WE CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

/s/ Michael Vigil
MICHAEL VIGIL, Judge

THE SUPREME COURT OF THE STATE OF NEW MEXICO
August 4, 2003

No. 28,127

KELLY GARNER,

Plaintiff-Respondent,

vs.

RONNIE GARNER,

Defendant-Petitioner.

ORDER

This matter coming on for consideration by the court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzer, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chavez concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeal number 23761.

IT IS SO ORDERED.

WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of August, 2003.

/s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

(SEAL)

42 U.S.C. Sec. 667. State guidelines for child support awards

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) Technical assistance to States; State to furnish Secretary with copies

The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

(Aug. 14, 1935, ch. 531 title IV, Sec. 467, as added Pub. L. 98-378, Sec. 18(a), Aug. 16, 1984, 98 Stat. 1321; amended Pub. L. 100-485, title I, Sec. 103(a), (b), Oct. 13, 1988, 102 Stat. 2346.)

AMENDMENTS

1988 – Subsec. (a). Pub. L. 100-485, Sec. 103(b), inserted ", and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts" before period at end.

Subsec. (b). Pub. L. 100-485, Sec. 103(a), designated existing provisions as par. (1), struck out ", but need not be binding upon such judges or other officials" after "within such State", and added par. (2).

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-485 effective one year after Oct. 13, 1988, see section 103(f) of Pub. L. 100-485, set out as a note under section 666 of this title.

EFFECTIVE DATE

Section 18(b) of Pub. L. 98-378 provided that: "The amendment made by subsection (a) (enacting this section) shall become effective on October 1, 1987."

45 C.F.R. PART 302 – STATE PLAN REQUIREMENTS – Table of Contents

Sec. 302.**56** Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the noncustodial parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

RULES OF CIVIL PROCEDURE FOR
THE DISTRICT COURTS ARTICLE 6
TRIALS (RULES 1-038 TO 1-053.2)

Masters

1-053. Masters.

* * *

E. **Report.**

(1) The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and unless waived by the parties he shall file with it a transcript or other authorized recording of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Paragraph C of Rule *1-006*. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

* * *

Child Support Enforcement (CSE) FY 2002
Preliminary Data Report

April 29, 2003

Department of Health and Human Services
Administration for Children and Families
Office of Child Support Enforcement
Division of Planning, Research, and Evaluation

Table 5: Statistical Program Status, FY 2002

TOTALS 16,061,202

NEW MEXICO 70,294

Table 10: Total Amount of Arrearages Due, FY 2002

TOTALS $92,322,439,377

NEW MEXICO $539,421,731

Source:

Statutes/Statutory Chapters in New Mexico Statutes Annotated 1978/CHAPTER 40 DOMESTIC AFFAIRS/ARTICLE 4 DISSOLUTION OF MARRIAGE/40-4-11.1. Child Support; guidelines. (1995)

40-4-11.1. Child support; guidelines.

A. In any action to establish or modify child support, the child support guidelines as set forth in this section shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support. Every decree or judgment of child support that deviates from the guideline amount shall contain a statement of the reasons for the deviation.

B. The purposes of the child support guidelines are to:

(1) establish as state policy an adequate standard of support for children, subject to the ability of parents to pay;

(2) make awards more equitable by ensuring more consistent treatment of persons in similar circumstances; and

(3) improve the efficiency of the court process by promoting settlements and giving courts and the parties guidance in establishing levels of awards.

C. For purposes of the guidelines specified in this section:

(1) "income" means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed. Income need not be imputed to the primary custodial parent actively caring for a child of the parties who is under the age of six or disabled. If

income is imputed, a reasonable child care expense may be imputed. The gross income of a parent means only the income and earnings of that parent and not the income of subsequent spouses, notwithstanding the community nature of both incomes after remarriage; and

(2) "gross income" includes income from any source and includes but is not limited to income from salaries, wages, tips, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, significant in-kind benefits that reduce personal living expenses, prizes and alimony or maintenance received, provided:

(a) "gross income" shall not include benefits received from means-tested public assistance programs or child support received by a parent for the support of other children;

(b) for income from self-employment, rent, royalties, proprietorship of a business or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required to produce such income, but ordinary and necessary expenses do not include expenses determined by the court to be inappropriate for purposes of calculating child support;

(c) "gross income" shall not include the amount of alimony payments actually paid in compliance with a court order;

(d) "gross income" shall not include the amount of child support actually paid by a parent in compliance with a court order for the support of prior children; and

(e) "gross income" shall not include a reasonable amount for a parent's obligation to support prior children who are in that parent's custody. A duty to support subsequent children is not ordinarily a basis for reducing support owed to children of the parties but may be a defense to a child support increase for the children of the parties. In raising such a defense, a party may use Table A as set forth in Subsection K of this section to calculate the support for the subsequent children.

D. As used in this section:

(1) "children of the parties" means the natural or adopted child or children of the parties to the action before the court but shall not include the natural or adopted child or children of only one of the parties;

(2) "basic visitation" means a custody arrangement whereby one parent has physical custody and the other parent has visitation with the children of the parties less than thirty-five percent of the time. Such arrangements can exist where the parties share responsibilities pursuant to *Section 40-4-9.1* NMSA 1978; and

(3) "shared responsibility" means a custody arrangement whereby each parent provides a suitable home for the children of the parties, when the children spend at least thirty-five percent of the year in each home and the parents significantly share the duties, responsibilities and expenses of parenting.

E. The basic child support obligation shall be calculated based on the combined income of both parents and shall be

paid by them proportionately pursuant to Subsections K and L of this section.

F. Physical custody adjustments shall be made as follows:

(1) for basic visitation situations, the basic child support obligation shall be calculated using the basic child support schedule, Worksheet A and instructions contained in Subsection K of this section. The court may provide for a partial abatement of child support for visitations of one month or longer; and

(2) for shared responsibility arrangements, the basic child support obligation shall be calculated using the basic child support schedule, Worksheet B and instructions contained in Subsection L of this section.

G. In shared responsibility situations, each parent retains the percentage of the basic support obligation equal to the number of twenty-four-hour days of responsibility spent by each child with each respective parent divided by three hundred sixty-five.

H. The cost of providing medical and dental insurance for the children of the parties and the net reasonable child-care costs incurred on behalf of these children due to employment or job search of either parent shall be paid by each parent in proportion to his income, in addition to the basic obligation.

I. The child support may also include the payment of the following expenses not covered by the basic child support obligation:

(1) any extraordinary medical, dental and counseling expenses incurred on behalf of the children of the parties. Such extraordinary expenses are uninsured expenses in excess of one hundred dollars ($100) per child per year;

(2) any extraordinary educational expenses for children of the parties; and

(3) transportation and communication expenses necessary for long distance visitation or time sharing.

J. Whenever application of the child support guidelines set forth in this section requires a person to pay to another person more than forty percent of his gross income for a single child support obligation for current support, there shall be a presumption of a substantial hardship, justifying a deviation from the guidelines.

K. BASIC CHILD SUPPORT SCHEDULE.-

* * *

multiply gross by the following percentages:

[1 child]	[2 children]	[3 children]	[4 children]	[5 children]	[6 children]
11%	16.1%	18.8%	20.8%	22. 6%	24%.

WORKSHEET A – BASIC VISITATION
_____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO
NO. _____

_____,
Petitioner,

vs.

_____,
Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

	Custodial Parent	Other Parent	Combined
1. Gross Monthly Income	$ _____ +	$ _____ =	$ _____
2. Percentage of Combined Income (Each parent's income divided by combined income)	_____% +	_____% =	_____ 100%
3. Number of Children ____			
4. Basic Support from Schedule (Use combined income from Line 1 x % based on children)		=	$ _____
5. Children's Health and Dental Insurance Premium	_____ +	_____ =	_____
6. Work-Related Child Care	_____ +	_____ =	_____
7. Additional Expenses	_____ +	_____ =	_____

8. Total Support
(Add Lines 4 [sic], 5, 6 and
7 for each parent
and for combined
column) _____ + _____ = _____
9. Each Parent's Obligation
(Combined Column Line 8
x each parent's Line 2) _____ _____
10. Enter amount for each
parent from Line 8 - _____ - _____
11. Each parent's net obligation
(Subtract Line 10 from Line 9
for each parent). _____ _____ Other Parent pays Custodial Parent this Amount

_____ PAYS _____ EACH MONTH $ _____

_____

_____ _____
Petitioner's Signature Respondent's Signature
Date: _____ _____

_____

BASIC VISITATION

INSTRUCTIONS FOR WORKSHEET A

Line 1. Gross monthly income:

Includes all income, except AFDC, food stamps and supplemental security income. If a parent pays child support by court order to other children, subtract from gross income. Use current income if steady. If income varies a lot from month to month, use an average of the

last twelve months, if available, or last year's income tax return. Add both parents' gross incomes and put total under the combined column.

Line 2. Percentage of Combined Income:

Divide each parent's income by combined income to get that parent's percentage of combined income.

Line 4. Basic Support:

Fill in number of children on worksheet (Line 3). Round combined income to nearest one hundred dollars ($100) [fifty dollars ($50)]. Look at the basic child support schedule. In the far left-hand column of the basic child support schedule, find the rounded combined income figure. Read across to the column with the correct number of children. Enter that amount on Line 4.

Line 5. Children's Health and Dental Insurance Premium:

Enter the cost paid by a parent for covering these children with medical and dental insurance under that parent's column on Line 5. Add costs paid by each parent and enter under the combined column on Line 5.

Line 6. Work-Related Child Care:

Enter the cost paid by each parent for work-related child care. If the cost varies (for example, between school year and summer), take the total yearly cost and divide by twelve. Enter each parent's figure in that parent's column on Line 6. Add the cost for both parents and enter in the combined column on Line 6.

Line 7. Additional Expenses:

Enter the amounts paid by each parent for additional expenses provided by Subsection I of this section on Line 7. Add the cost for both parents and enter in the combined column on Line 7.

Line 8. Total Support:

Total [add] the basic support amount from Line 4 in the combined column with the combined column on Lines 4, 5, 6 and 7 [5, 6 and 7] and enter the totals in combined column on Line 8.

Line 9. Each Parent's Obligation:

Multiply the total child support amount on Line 8 by each parent's percentage share on Line 2, and enter each parent's dollar share under that parent's column on Line 9.

Line 10. Total Support:

Enter the total amount shown for each parent on Line 8 beside the "minus" marks on Line 10.

Line 11. Net Obligation:

For each parent, subtract the amount on Line 10 from the amount on Line 9. Enter the difference for each parent in that parent's column on Line 11. The amount in the box "other parent" is what that parent pays to the custodial parent each month. Do not subtract the amount on the custodial parent's Line 11 from the amount in the other parent's box. The custodial parent is presumed to use the amount in that parent's column on Line 11 for the children.

SHARED RESPONSIBILITY

INSTRUCTIONS FOR WORKSHEET B [sic]

_____ JUDICIAL DISTRICT COURT

COUNTY OF _____

STATE OF NEW MEXICO

NO. _____

_____,

Petitioner,

vs.

_____,

Respondent.

MONTHLY CHILD SUPPORT OBLIGATION

	Mother	Father	Combined
Part 1 – Basic Support:			
1. Gross Monthly Income	$ _____	$ _____ =	$ _____
2. Percentage of Combined Income (Each parent's income divided by combined income)	_____	+ _____ =	_____ 100%
3. Number of Children _____			
4. Basic Support from Schedule (Use combined income from Line 1 x % based on # children)		= $ _____	
5. Shared Responsibility Basic Obligation (Line 4 x 1.5)		= _____	
6. Each Parent's Share (Line 5 x each parent's Line 2)	_____	_____	
7. Number of 24 hour days with each parent (must total 365)	_____	+ _____ =	_____
8. Percentage with each parent (Line 7 divided by 365)	_____	+ _____ =	_____ 100%

9. Amount retained (Line 6 x Line 8 for each parent) _____ _____

10. Each Parent's Obligation (subtract Line 9 from Line 6) _____ _____

11. Amount Transferred (subtract smaller amount on Line 10 from larger amount on Line 10.) Parent with larger amount on Line 10 pays other parent the difference. = _____

Part 2 – Additional Payments:

12. Children's Health and Dental Insurance Premium _____ + _____ = _____

13. Work-Related Child Care _____ + _____ = _____

14. Additional Expenses _____ + _____ = _____

15. Total Additional Payments (Add Lines 12, 13 and 14 for each parent and for combined column) _____ + _____ = _____

16. Each Parent's Obligation (Combined Column Line 15 x each parent's Line 2) _____ _____

17. Amount transferred (Subtract each parent's Line 16 from his Line 15). Parent with "minus" figure pays that amount to other parent. _____ _____

Part 3 – Net Amount Transferred:

18. Combine Lines 11 and 17 by addition if same parent pays on both lines, otherwise by subtraction. = _____

_____ PAYS _____ EACH MONTH $ _____

Petitioner's Signature Respondent's Signature

Date: _____ _____

SHARED RESPONSIBILITY

INSTRUCTIONS FOR WORKSHEET B

Part 1 – Basic Support:

Line 1. Gross Monthly Income:

Includes all income, except AFDC, food stamps and supplemental security income. See text for allowed deductions from income. Use current income if steady. If income varies a lot from month to month, use an average of the last twelve months, if available, or last year's income tax return.

Add both parents' gross incomes and put total under the combined column.

Line 2. Percentage of Combined Income:

Divide each parent's income by combined income to get that parent's percentage of combined income.

Lines 3 and 4. Basic Support:

Fill in number of children on worksheet (Line 3). Round combined income to nearest one hundred dollars ($100). Look at the basic child support schedule. In the far left-hand column of that schedule, find the rounded combined income figure. Read across to the column with the correct number of children. Enter that amount on Line 4.

Line 5. Shared Responsibility Basic Obligation:

Multiply the basic obligation on Line 4 by 1.5.

Line 6. Each Parent's Share:

Multiply the support amount on Line 5 by each parent's percentage share on Line 2, and enter each parent's dollar share under that parent's column on Line 6.

Line 7. Each Parent's Time of Care for Children:

Enter the number of twenty-four-hour days of responsibility that each parent has each child in a year according to the parenting plan.

Line 8. Percentage of Twenty-Four-Hour Days With Each Parent:

Divide each parent's number of twenty-four-hour days (Line 7) by three hundred sixty-five to obtain a percentage.

Line 9. Amount Retained:

Under shared responsibility arrangements, each parent retains the percentage of the basic support obligation equal to the number of twenty-four-hour days of responsibility spent by each child with each respective parent divided by three hundred sixty-five. Multiply each parent's share of basic support (Line 6) by the percentage in that parent's Line 8 and enter the result on that parent's Line 9. This is the amount that each parent retains to pay the children's expenses during that parent's periods of responsibility.

Line 10. Each Parent's Basic Obligation:

Subtract the amount retained by each parent for direct expenses (Line 9) from that parent's basic obligation (Line 6) and enter the difference on that parent's Line 10.

Line 11. Amount Transferred for Basic Support:

In shared responsibility situations, both parents are entitled not only to retain money for direct expenses but also to receive contributions from the other parent toward those expenses. Therefore, subtract the smaller amount on Line 10 from the larger amount on Line 10 to arrive at a net amount transferred for basic support.

Part 2 – Additional Payments:

Line 12. Children's Health and Dental Insurance Premium:

Enter the cost paid by a parent for covering these children with medical and dental insurance under that parent's column on Line 12. Add costs paid by each parent and enter under the combined column on Line 12.

Line 13. Work-Related Child Care:

Enter the cost paid by each parent for work-related child care. If the cost varies (for example, between school year and summer), take the total yearly cost and divide by twelve. Enter each parent's figure in that parent's column on Line 13. Add the cost for both parents and enter in combined column on Line 13.

Line 14. Cost Paid For Additional Expenses:

Enter the cost paid by each parent for additional expenses provided by Subsection I of this section on Line 14.

Line 15. Enter Total of Lines 12, 13 and 14.

For each parent, total the amount paid by him for insurance, child care and additional expenses (Lines 12, 13 and 14). Enter the total in that parent's column on Line 15 and the total of both parents' expenses under the combined column on Line 15.

Line 16. Each Parent's Obligation:

Multiply the total additional payments (combined column on Line 15) by each parent's percentage share of income on Line 2, and enter each parent's dollar share of the additional payments on his Line 16.

Line 17. Amount Transferred:

Subtract each parent's obligation for additional expenses (that parent's Line 16) from the total additional payments made by that parent (that parent's Line 15). The parent with a "minus" figure pays the other parent the amount on Line 17.

Part 3 – Net Amount Transferred:

Line 18. Combine Lines 11 and 17:

Combine the amount owed by one parent to the other for basic support (Line 11) and the amount owed by one parent to the other for additional payments (Line 17). If the same parent owes for both obligations, add Lines 11 and 17, and enter the total on Line 18. If one parent owes

for basic support and the other owes for additional payments, subtract the smaller amount from the larger and enter on Line 18. Fill in the blanks by stating which parent pays and which parent receives the net amount transferred.

40-4-11.2. Grounds for deviation from child support guidelines. (1989)

Any deviation from the child support guideline amounts set forth in *Section 40-4-11.1* NMSA 1978 shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate. Circumstances creating a substantial hardship in the obligor, obligee or subject children may justify a deviation upward or downward from the amount that would otherwise be payable under the guidelines.

40-4-11.3. Review of child support guidelines. (1989)

Within four years of the effective date of this section and every four years thereafter, the child support guidelines set forth in *Section 40-4-11.1* NMSA 1978 shall be reviewed as to their appropriateness by an appropriate executive or legislative commission or executive department.